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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 799

JESSE ALEXANDER ELLER, ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland, filed July 25, 1972 (Joint Appendix of the parties [J.A.] 256a), is unreported. The opinion of the United States District Court for the District of Maryland, filed August 31, 1972 (J.A. 326a) is unreported. The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, p. A-1 of Petition) is reported *sub nom. Sylvester J. Vaughns, et al. v. Board of Education of Prince George's County, et al.* at ..... F.2d .

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether a statement by an administrator in the Department of Health, Education and Welfare (HEW), that a plan for desegregation of a school system was accepted as meeting the requirements of Title VI of the Civil Rights Act of 1964 prevents a court from finding that the system, segregated by law prior to 1954, had never dismantled its dual school system where, although blacks comprised less than 23% of the school system's population, in every year from 1954 to the present at least 60% of the black children attended predominantly black schools, and at least 66% of the white children attended predominantly white schools?

2. Whether petitioner intervenors were denied due process in being required to abide by their agreement to present no new evidence on whether the defendants had complied with constitutional requirements when their intervention occurred after the District Court had issued its opinion declaring that the defendants had not so complied?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are Amendment V, Constitution of the United States—

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

and Amendment XIV, Constitution of the United States—

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are Title 42, United States Code § 1983—

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

and Title 42, United States Code § 2000d—

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This suit was commenced March 29, 1972 by plaintiffs, the parents of eight children attending the Prince George's County public schools against the Board of Education of Prince George's County, its members, and the superintendent of schools, seeking declaratory and injunctive relief to remedy racial discrimination resulting in segregation of children and faculty and racial discrimination in the district's provision of public education (J.A. 6a).

Both parties filed an extensive joint stipulation of facts (J.A. 111a) and eighteen exhibits thereto (J.A. 153a-254a). The exhibits included a letter from the Director of the Office for Civil Rights of HEW stating that his office had approved the school district's plans in 1969, but that the plan was not adequate under the standards enunciated in *Swann v. Charlotte Mecklenburg*, so a new plan would be required (J.A. 249a-251a).

On July 25, 1972, the district court granted a motion of plaintiffs for summary judgment insofar as the motion sought a declaration that the defendants had not dismantled their dual school system or converted to unitary operation. It also ordered the defendants to continue to work on desegregation plans which were then in progress, to file a progress report on said plans on August 22, 1972 and set a hearing date on August 25, 1972, to consider the reports due on August 22, and the question of the type and nature of relief required.

On August 23, 1972, petitioners here filed a motion to intervene. Pending disposition of their motion, they participated in a limited way in the hearings which were held from August 25-31. On August 31, 1972, the district court filed an order and opinion (J.A. 326a) which directed the defendants to complete desegregation plans on a schedule which would desegregate only the elementary and the junior high schools by January of 1973 and defer desegregation of the senior high schools until September, 1973 and to present such plans on or before December 4, 1972 for hearing scheduled on December 11, 1972.

Petitioners motion to intervene was granted as of September 1, 1972 on condition *inter alia* that they were satisfied with their limited rights during the proceedings until the Court's order of August 31 and that they would present no new evidence relating to the issue of existing compliance with the standards of equal protection as opposed to evidence relating to questions pertaining to type and timing of relief. Counsel informed the court that this order was fully and completely acceptable to them and to their respective clients (Appendix D, p. D-3 to Petition).

Both the defendant school board and the intervenors appealed from the district court's decision of July 25 and

August 31, and the plaintiff cross-appealed from that portion of the district court's August 31 order which deferred senior high desegregation until September, 1973. On the appeals the Court of Appeals stated that the only substantial question of substance raised by any the appeals was whether the court could properly delay implementation of a plan for the senior high schools until September, 1973, and "that question is one that is, and will be, within the bosom of the District Court." The case was remanded for further proceedings in the district court, which proceedings are now under way.

ARGUMENT

As the Court of Appeals for the Fourth Circuit stated, petitioners here raise no substantial questions. On the basis of the facts stipulated by plaintiffs and defendants and not questioned by intervenors, defendants never operated a unitary school system. Their obligation to dismantle their dual school system was never discharged, and there is no conflict in any court decisions on this issue.

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. *The Dual School System Was Never Dismantled.*

Prior to 1954, the schools in Prince George's County were segregated by law. In every year subsequent to that date, despite the fact that black children constitute less than 23% of the school population, at least 60% of the black children attended a school which was predominantly black, and at least 66% of white students attended schools which were predominantly white. Thus the dual school system was never effectively dismantled.

In school years 1955-65 the school system operated under a "freedom of choice" plan whereby at the end of the

1964-65 school year over 82% of the black students attended schools which were 100% black, and over 73% of the white students attended schools which were over 95% white (J.A. p. 218a).

Geographic attendance zones were established in 1965-66. This plan did not consider or use pairing or grouping of schools, or noncontiguous attendance zones or restructuring of grade levels or transportation of pupils as a means of discharging the boards duty to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). As a result, over 68% of the schools in the system remained in excess of 95% white or 95% black (J.A. 219a).

In 1969-70, the defendants, at the request of HEW, redrew attendance boundaries and changed pupil assignment criteria for 9 of their then 199 schools (J.A. 225-233a). Of the nine schools affected by the change, eight remain virtually all black to this day (J.A. 156a). One year after the adoption of this plan, 142 of 218 schools (65%) had student bodies in excess of 90% white or 80% black (J.A. 235a).

Petitioners apparently contend that the aforementioned plan converted Prince George's County to a unitary system, despite the fact that in this system which is three-quarters white, over 60% of the black children attend predominantly black schools. Petitioners base their assertion on a statement by an HEW official that the plan complied with the requirements of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). Such a statement does not even bind HEW with respect to further provision of federal assistance. The first statement by HEW was based on the assumption that adoption of simple geographic attendance zones sufficed to comply with defendant's duty

to desegregate, an assumption shown to be clearly wrong by this Court's opinions in *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971) and *Davis v. Bd. of Commissioners*, *supra*. Recognizing its mistake, HEW has now stated that Prince George's County school system is not in compliance (J.A. 250a). In any event, a statement by an administrator in a situation in which plaintiffs were not represented cannot bind a court in a suit brought by the plaintiffs. Thus, this Court has previously found plans inadequate which HEW had approved. See *Raney v. Board of Education*, 391 U.S. 443 (1968).

B. *Intervenors Were Not Denied Due Process.*

1. INTERVENORS CONSENTED TO LIMITATIONS ON THEIR RIGHTS.

It is apparent on the face of the order permitting intervention that petitioner intervenors consented to the limitations on their position. That order provided, in part:

> "5. . . . In addition, unless this Court's order of July 25, 1972 is reversed in whole or in part by the United States Court of Appeals for the Fourth Circuit, the intervenors shall not seek to present to this Court any evidence, testimonial or documentary, other than that which was presented to this Court by joint stipulation of the parties prior to July 25, 1972 and made a matter of record herein, relating to the issue of compliance or non-compliance with the standards of *Brown I*, *Brown II*, and Swann, as opposed to evidence relating to questions pertaining to type and timing of relief. Intervenors shall of course have the opportunity to present such latter type of evidence subject to the provisions of this Order.
>
> 6. Counsel for the parties have orally informed the Court that the within Order, and each and every one of its terms and provisions, is fully and completely acceptable to them and to their respective clients" (Appendix D, p. D-2, 3 of Petition).

Petitioner intervenors apparently regret their choice, for it prevents them from reopening the decision of the Court which was made prior to their motion to intervene, and thus prevents them from delaying desegregation of the school system. But binding intervenors to an agreement knowingly made is hardly a denial of due process.

2. INTERVENORS PROFFER OF "NEW EVIDENCE" IS IRRELEVANT.

Petitioner intervenors claim denial of due process because the letter from HEW in 1969 stating that Prince George's County had complied with Title VI was not in the record. However, that letter added no new fact of significance. The specific plan desired by HEW was in the record (J.A. 225a et seq.) the consequence for particular schools are in the record in the annual enrollment breakdown of the schools (J.A. 156a et seq.) and the fact that HEW had approved the plan was in the record, contained in the letter from the Director of the Civil Rights Division of HEW stating that such earlier approval had been given but was in error (J.A. 249a).

Petitioners also state that they wish to present evidence of "causes which resulted in changing the racial makeup of the schools since 1969." (Petition, p. 5). Since there was no dismantling of the segregated system in 1969, such proof is not relevant to show that the school district has complied with the requirements of *Swann*, *supra*.

II.

THERE IS NO CONFLICT OF DECISION

The decision here is completely consistent with the decision of the Maryland Court of Appeals in *Borders v. Board of Education*, 265 Md. 488, 290 A.2d 510 (1972). That case involved a challenge by white parents seeking

to prevent even the small modicum of desegregation which the Board had attempted at the urging of HEW. Since the issue before the court was the authority of the school board to take some steps towards desegregation, the court did not need to decide whether the segregation in Prince George's County was *de facto* or *de jure*. Obviously in a suit brought by white parents seeking to prevent even modest desegregation against a school board only reluctantly willing to desegregate in the face of threats of federal fund cut offs, neither side contended that any of the existing segregation was *de jure*. The court proceeded on the basis that the board acted within its power even if the system had been *de facto*, but it did not commit itself as to whether the system was in fact *de facto* or *de jure*. It did say, however, "an indefinite continuation of the present attendance lines might well raise such a presumption [that the failure to redraw attendance lines was racially motivated]." Thus, the only decision in any court as to the nature of segregation in Prince George's County schools is that of the federal court in this case. And, as the Fourth Circuit indicated upon its review of that decision, it was clearly consistent with earlier decisions of the Fourth Circuit and this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 29, 1972.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of December, 1972, two copies of the foregoing brief were mailed, postage prepaid, to Emmett H. Nanna, Jr., Esquire, and Richard A. James, Esquire, 5132 Baltimore Ave., Hyattsville, Maryland 20781; and Paul M. Nussbaum, Esquire, 3723 - 34th Street, Mt. Rainier, Maryland, 20822.

BY: GERALD A. SMITH